in view of the Statute of Frauds which required a guarantee to be in writing. The distinction between guarantee and indemnity can be found in *Pollock & Mulla* on Indian Contract and Specific Relief Acts, Ninth Edition, at page 612. Having regard to the authorities, I am inclined to the view that Exhibit AB2 is a contract of guarantee.

Accordingly, I enter judgment for the plaintiffs in the sum of $135,666 with interest at 6% per annum from July 27, 1973 up to date of realisation and costs.

Judgment for the plaintiff.

Solicitors: *Zain & Co.; Allen & Gledhill.*

SINO MALAY TRANSPORT SDN. BHD. v. QBE INSURANCE LTD.

[O.C.J. (Mohamed Azmi J.) February 28, 1979]
[Kuala Lumpur — Originating Motion No. 63 of 1977]

Insurance — Workmen's Compensation Insurance — Repudiation of liability — Whether effective — Reference to arbitration in case of dispute — Application for enlargement of time.

Arbitration — Application for enlargement of time to refer to arbitration — Undue hardship — Arbitration Act, 1952, s. 28.

In this case the applicant had taken out a Workmen's Compensation Policy from the respondent to cover its drivers and attendants in respect of its motor lorries. An injured driver of the applicant claimed damages for negligence and breach of statutory duty. The respondent informed the applicant that it disclaimed liability. Judgment was given against the applicant and it claimed the judgment sum from the respondent under the contract of insurance. Under the policy disputes should be referred to arbitration within twelve months of the date of dispute. The applicant applied for enlargement of time for arbitration.

Held: (1) the respondent had effectively repudiated its liability under the policy of insurance;

(2) in this case and in view of the long delay there would be greater hardship to the respondent if the application for enlargement of time were to be granted. The application must therefore be dismissed.

Cases referred to:-

(1) *Warney, Combe, Reid & Co. Ltd.* v. *E.M. Dower & Co. Ltd.* [1956] 2 Lloyds L.R. 325 C.A.

(2) *Liberian Shipping Corporation* v. *A. Kong & Sons Son* [1967] 1 All E.R. 934 C.A.

The following case was also referred to in argument: *Safety Insurance Company Sdn. Bhd.* v. *Chow Soon Tat* [1975] 1 M.L.J. 193.

ORIGINATING MOTION.

Joga Singh for the applicant.

Cecil W. Abraham for the respondent.

Cur. Adv. Vult.

Mohamed Azmi J.: This is an application by notice of motion dated June 3, 1977 by the applicant, for an order that a fit and proper person be appointed to act as an arbitrator under section 12 of the Arbitration Act, 1952, or, alternatively, in the event that the court finds the respondent has validly made a repudiation of liability by its letter dated October 17, 1972 pursuant to condition 8 of the Workmen's Compensation Policy No. 136WC/50475, for an order of enlargement of time for arbitration under section 28 of the Act.

The facts in this case may be summarised as follows. The applicant, a transport company, took out a Workmen's Compensation Policy from the respondent to cover its drivers and attendants in respect of six motor lorries in the States of West Malaysia. The policy covered the period from September 2, 1966 to September 1, 1969. During the currency of the policy, one of the motor lorries was involved in an accident on April 21, 1969, in which the driver Teo Kah Wa was injured. It would appear that the accident occurred when the front near-side wheel of the lorry suddenly came off and the vehicle went off the road and overturned. On September 5, 1972, the injured driver issued a writ against the applicant claiming damages for negligence and breach of statutory duty *vide* Muar High Court Civil Suit No. 108 of 1972. On October 7, 1972, the respondent wrote to the applicant which the respondent claims to be a letter of repudiation, by which it disclaims liability pursuant to condition 8 of the policy. (See "PKH.26"). The applicant, however, does not accept the letter as a valid letter of repudiation, and on November 23, 1972 the applicant's solicitors, Messrs. Miranda & Co., filed a defence to the claim of the injured lorry driver. Judgment for the sum of about $30,000 was obtained by the lorry driver against the applicant on January 8, 1977. The applicant now claims the judgment sum against the respondent under the contract of insurance. In view of the respondent's stand that it has already disclaimed liability on September 5, 1972 by virtue of condition 8 of the policy, any claim must be referred for arbitration within twelve months of that date. Any claim not referred for arbitration after that period shall be deemed to have been abandoned and shall not be recoverable under the policy. Hence, the present application by the applicant for enlargement of time for arbitration unless the court decides Exhibit PKH.26 does not constitute a valid repudiation of liability.

Condition 8 of the policy provides:

"All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an Award shall be a condition precedent to any right of action against the Company. If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

The first issue for determination is whether on September 5, 1972, the respondent has effectively disclaimed liability *vide* its letter to the applicant marked Exhibit "PKH.26". In view of its importance, the whole letter is reproduced below:

"7th October, 1972

Messrs. Sino-Malay Transport Co.,
Sdn. Bhd.,
No. 154, Jalan Sialang,
Tangkak, Johore.

Dear Sirs,

Accident on 21st April, 1969
at 49th m.s. Johore Bharu/Ayer Itam Road,
Invl. Lorry Driver, Mr. Teo Kah Wah

This is to acknowledge receipt of your Registered letter dated 5th October, 1972, and we confirm receipt of a copy of the Writ of Summons filed in the Muar High Court by the plaintiff's solicitors, Messrs. Murphy & Dunbar, Malacca.

It is noted from the Statement of Claim that the plaintiff, among other things, is endeavouring to establish negligence on the part of your company, as employers, for failure to maintain the motor lorry in a road-worthy condition. In the event of the claim being established in the court, it would imply that your company is in breach of the Policy conditions, particularly General Condition No. 3.

As such, we are now returning herewith the Writ of Summons for your further attention, and we strongly urge you to engage your company's solicitors to defend this Civil Action in the court, as you will appreciate that failure on your part to enter the necessary Appearance within the specified period may involve your company in ultimate liability on a judgment in default thereof.

Nothwithstanding repudiation of liability on this particular claim, we wish to provide you an option to represent your company by our Company's own solicitors in the defence of the plaintiff's solicitors' claim, provided that we have your undertaking that your company will bear the full amount of all legal expenses incurred, including the final settlement of the plaintiff's solicitors' claim, when same is concluded.

We look forward to receiving your instructions in respect of the last point mentioned herein.

Yours faithfully,
Sd.
(K. H. TAN)
Manager for Kuala Lumpur

c.c. M/s Shearn, Delamore & Co.,
(Ref: SD. 23447 (RSS)).
'Q.I.' S'pore.
(Ref: MWC. 800)."

Having considered this letter as a whole and in particular to paragraphs 2 and 4, I have no hesitation in coming to the conclusion that Exhibit PKH.26 constitutes a valid repudiation of liability by the respondent in respect of Teo Kah Wa's accident as envisaged by condition 8 of the policy. The repudiation is clearly expressed. There is no vagueness in the intention of the respondent to disclaim liability. However, "Notwithstanding repudiation of liability on this particular claim", the respondent offered the services of its solicitors to represent the applicant company in the suit brought by the injured lorry driver, subject to certain undertakings. There was no response to the repudiation of liability; nor to the offer of legal assistance. The applicant proceeded with the civil proceedings in Muar High Court to its ultimate conclusion. From the submission of counsel for the applicant, it would appear that the applicant in fact knew that the repudiation was effective, but the applicant was under the impression that the effective date of repudiation was from the date of judgment of the Muar High Court case.

The second and last issue for determination is whether the court should exercise its discretion by granting the applicant enlargement of time for arbitration. Section 28 of the Arbitration Act, 1952 provides:

"Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given, or an arbitrator is appointed, or some other step to commence arbitration proceedings is taken, within a time fixed by the agreement and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to any written law limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper."

The mere fact that the applicant has been at fault does not automatically disqualify it from obtaining extension of time. There can still be undue hardship on the applicant if the consequences of not granting extension are out of proportion to his fault. The meaning of "undue hardship" under section 27 of the English Arbitration Act, which is equivalent to our section 28, has been considered in *Watney, Combe, Reid & Co. Ltd.* v. *E.M. Dower & Co., Ltd.*[1] Singleton L.J. at page 230 said:

"What, then, is the meaning of 'undue hardship'? 'Undue' it is said... means something which is not merited by the conduct of the claimant. That may be right. If the result of claimants being perhaps a day late is so oppressive, so burdensome, as to be altogether out of proportion to the fault, I am inclined to think that one may well say that there is undue hardship."

In *Liberian Shipping Corporation* v. *A. King & Sons, Ltd.*,[2] Lord Denning said at page 93:

"It does appear that in the past the courts have been inclined to emphasise the word 'undue', and to say that if a man does not read the contract and is a day or two late, it is 'hardship'; but it is not an 'undue hardship', because it is his own fault. I cannot accept this narrow interpretation of the Statute. These time-limit clauses used to operate most unjustly. Claimants used to find their claims barred when, by some oversight, they were only a day or two late. In order to avoid that injustice, the legislature intervened so as to enable the courts to extend the time whenever 'in the circumstances of the case undue hardship would otherwise be caused'. 'Undue' there simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault."

In the present case, under condition 8 of the policy, the applicant ought to have referred the claim for arbitration within twelve months of the date of repudiation of liability (October 7, 1972). The last date for referring the claim for arbitration was October 6, 1973. The effect of allowing the application would be to extend the time for approximately 3 years 8 months since the present application is only made on June 3, 1977. Like all discretions, the power to extend time under section 28 must be exercised judicially and not arbitrarily. The court must be satisfied that undue hardship would be caused if the extension is not granted. In my judgment, what constitutes "undue hardship" depends on the facts of each particular case. The court must strike a balance between the interest of both parties in determining "undue hardship". In the present case, the applicant is not a few days late. The delay is more than 3½ years. The consequences of not granting extension is not out of proportion to his fault. As regards delay in making the present application, counsel for the applicant explained that it was due to the applicant's impression that the effective date of repudiation was from the date of judgment in the Muar High Court case. As a result, they waited till January 8, 1977 when judgment was entered. This impression was allegedly due to paragraph 2 of letter of repudiation. I am not impressed with this explanation. Assuming that the respondent's letter is vague, the applicant should

have referred the claim for arbitration straightaway, or, alternatively, it should have responded to the respondent's letter for clarification. By its failure to reply, it can reasonably be interred that the applicant understood fully the contents of that letter. This is not a case where the policy-holder is a common man in the street who has failed to read the policy and through oversight is a few days out of time. Since the repudiation of liability on October 7, 1972, the applicant company has been advised by five different firms of solicitors. In fairness to the present solicitors of the applicant, they only came into the picture after January 8, 1977. It is inconceivable that the previous four solicitors could not understand the implication of the letter of repudiation in the light of condition 8 of the policy. All of them could not have failed to read the policy and misunderstood the intention of the letter of repudiation. In the case of Messrs. Lawrence Ting Poi Tek & Co., Malacca, the respondent's letter to them dated January 26, 1973 (Exhibit "NSC.1" attached to Mr. Ng Sing Cheong's affidavit) again refers to repudiation of liability. During that period, reference of claim to arbitration was still within time. Yet, nothing was done by any of the solicitors till March 23, 1977 when for the first time, the present solicitors of the applicant challenged the validity of the repudiation and proceeded to make the present application.

In this case, I find the affidavit of Mr. Pang Kim Hua, the manager of applicant company, does not disclose undue hardship to the applicant if the extension is not granted. The long delay in filing the present application is inordinate and inexcusable. In my view, to grant the extension would cause undue hardship to the respondent, in that eight years have elapsed since the road accident in 1969. Allowing the applicant's claim to go for arbitration at this stage would be an exercise in futility as far as the respondent is concerned. The respondent would be at a disadvantage since it would be faced with problems with regard to evidence. The main dispute in the proposed arbitration would be on the issue of whether the applicant has properly maintained the motor lorry as required by condition 3 of the policy. The lorry in question has since been sold and it would be difficult to recover the wheel of the lorry which suddenly became detached from the vehicle. The respondent has not been able to examine the defective wheel although it has requested for this exhibit as early as January 27, 1970. (See Exhibit "PKH.13").

Having regard to all the circumstances of this case, I am of the opinion that greater hardship would be caused to the respondent if the application for enlargement of time were to be granted. The long delay was not caused by the respondent. On the other hand, the applicant has failed to show 'undue hardship' except for the fact that it cannot claim the judgment sum in the Muar case against the respondent. In my opinion, this is not a proper case for the court to exercise its discretion under section 28 of the Arbitration Act. The application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *R. Talalla & Co.; Shearn Delamore & Co.*

A SIGMA AIR CONDITIONING SENDIRIAN BHD. v. WORLD WIDE AGENCIES (M) SDN. BHD.

[O.C.J. (Mohamed Azmi J.) March 1, 1979]

[Kuala Lumpur — Application for Execution No. 249 of 1975]

Practice and Procedure — Execution of judgment — Writ of seizure and sale issued — Objection by person claiming he is owner of goods seized — Whether purchase of goods bona fide — Appeal against decision of Senior Assistant Registrar — R.S.C. 1957, O. 54, rr. 12 & 21; O. 57, r. 11

The plaintiffs had obtained judgment against the defendant company and had proceeded to attach the moveable property of the defendant company. The objector claimed to be the owner of the goods seized. The Senior Assistant Registrar dismissed the notice of objection and the objector appealed.

Held: (1) as the evidence showed that the goods were purchased by the objector for and on behalf of another company, it was for that other company to object and not for the objector in his personal capacity to do so;

(2) even if the objector had purchased the goods for himself, he has failed to show that the purchase was *bona fide.*

Cases referred to:-

(1) *Wood* v. *Dixie* (1845) 7 Q.B. 892.

(2) *Thompson* v. *Webster* 4 Drewery 628.

(3) *Natal Land and Colonization Company Ltd.* v. *Pauline Colliery and Development Syndicate Ltd.* [1904] A.C. 120.

The following authorities were also referred to: *Lim Ker* v. *Chew Seok Tee* [1967] 2 M.L.J. 253; *Re M.P.C.N. Andiappa Chetty & Ors.* 1 F.M.S.L.R. 8.

APPLICATION.

K.C. Loke for appellant/objector.

B.K. Tan for respondent/plaintiffs.

Defendants not represented.

Cur. Adv. Vult.

Mohamed Azmi J.: This is an appeal by the objector, Mr. Yew Fei Chwen, against the decision of the Senior Assistant Registrar dismissing his notice of objection dated December 11, 1975.

At the commencement of the hearing, counsel for the Judgment Creditors raises a preliminary objection. It is his contention that this appeal should go direct to Federal Court by virtue of Order 57 rule 11(5) of the Rules of the Supreme Court after leave has been obtained from the Registrar under rule 11(1). In the absence of such leave, the decision of the Registrar shall be final and conclusive. He also raises objection to the notice of appeal as it contains an appeal against two decisions of the Registrar given on separate dates. The first is against dismissal of notice of objection dated December 11, 1975, and the second is against another dismissal of notice of objection dated February 4, 1976. I dismiss the preliminary objection and rule that Order 57 rule 11 only applies where interpleader proceedings are heard by a judge, but when they are heard by a Registrar, Order 54 rule 21 will apply by virtue of rule 12 of the said order. As regards the defect in the notice of appeal, counsel for the objector concedes that the present appeal is only against the dismissal of the first notice of objection involving 181 items and not against the second notice of objection involving the whole property of the Judgment Debtors. The present appeal is, therefore, heard on that basis.